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(2)

No. 08-174

Supreme Court, U.S.
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In The Supreme Court of the United States

JUDY WANG,

Petitioner,

v.

PRUDENTIAL FINANCIAL CORPORATION AND PRUDENTIAL INSURANCE COMPANY OF AMERICA, D/B/A PRUDENTIAL INSURANCE COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. A party must file a motion for continuance showing diligence in seeking an extension to file a response to a summary judgment. The district court granted Wang's only motion for continuance regarding her response to Prudential's first motion for summary judgment. Did the district court err in failing to *sua sponte* extend Wang's time to file an additional response after Wang filed her response and never requested a second extension?

2. A party must plead some facts to support the elements of a claim. Wang did not plead any facts that would support an Equal Pay Act ("EPA") or state law conversion claim. Did the district court err in granting Prudential a final judgment after granting Prudential's summary judgment motions that covered all of Wang's pleaded claims?

3. A party waives a complaint unless it timely raises it in the district court and in the court of appeals. Wang failed to raise any complaint about the timing of her response to Prudential's first motion for summary judgment or the finality of the district court's order in either the district court or Fifth Circuit Court of Appeals. Did Wang waive the complaints in her Petition for Writ of Certiorari?

PARTIES TO THE PROCEEDINGS

Petitioner is Judy Wang.

Respondents are Prudential Financial Corporation, and Prudential Insurance Company Of America, D/B/A Prudential Insurance Company. Respondents are not related to any other publicly held or publicly-traded companies.

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondents Prudential Financial Corporation, and Prudential Insurance Company Of America, D/B/A Prudential Insurance Company (hereinafter collectively "Prudential") respectfully submit this Brief in Opposition to the Petitioner Judy Wang's Petition For Writ of Certiorari.

I. STATEMENT OF THE CASE

A. Summary of the Argument

This honorable Court should deny Wang's Petition because the Court of Appeals' decision affirming the district court's rulings is unremarkable under the facts of this case. The court of appeals' opinion did not conflict with this Court's prior opinions or those of any sister court of appeals. It is also not precedent as it is an unpublished opinion that does not discuss any legal or factual issue. This Court's resources are better served on other cases dealing with important legal issues.

If a party desires to extend the time to file a response to a summary judgment motion, that party has a duty to request an extension and explain why it is needed, the evidence to be discovered, and why the evidence has not already been discovered. The district court in this case granted Wang's only request for a continuance regarding her response to Prudential's first motion for summary judgment. The district court

did not abuse its discretion in accepting Wang's response, which was timely filed, and not *sua sponte* granting an extension to file an additional response.

Waiver principals serve an important function in our legal system. A party should not be able to "lay behind the log" and raise complaints for the first time in this Court without giving the district court and court of appeals an opportunity to consider them. Wang did not raise either issue in her Petition for Writ of Certiorari with the district court or the Fifth Circuit Court of Appeals. This Court should deny Wang's Petition.

B. Statement of Facts

1. Prudential Terminated Wang's Employment For Conducting A Transaction That Violated Conflict Of Interest Rules

Prudential employed Wang as an insurance agent until her termination on October 8, 2004 (C.R. 488). Pursuant to a Statutory Agent Agreement, she was not employed for any definite period of time and her employment was terminable at-will by either Wang or Prudential (*Id.*). Prudential terminated Wang after an investigation revealed that she had effected the change of ownership on a client's life insurance policy naming her own son as the policyholder and beneficiary after misrepresenting her son to be the "adopted son" of the insured (*Id.*). Prudential concluded that not only did Wang's actions in this regard cause a

potential for conflict of interest, but her misrepresentation of her son's relationship to the insured did not allow Prudential's Underwriting Department to properly determine if there was an insurable interest for the policy (C.R. 488-489). Prudential did not terminate Wang for any impermissible reason.

2. Wang Sued Prudential and Treta for Various Employment Related Claims

Wang initially sued Prudential and Treta, her supervisor, for alleged violations of the Age Discrimination in Employment Act of 1967 ["ADEA"]; Title VII (race discrimination, racially hostile work environment, and retaliation); 42 U.S.C. § 1981; the Texas Commission on Human Rights Act, Texas Labor Code Chapter 21 ["TCHRA"]; and common-law causes of action for intentional infliction of emotional distress, negligent supervision, retention and training, and defamation (C.R. 20).

3. District Court Dismissed Some of Wang's Claims Under Rule 12(b)(6)

Prudential and Treta filed a motion for partial dismissal under Rule 12(b)(6) alleging that some of Wang's claims in her original complaint should be dismissed (C.R. 62). Wang filed a response and stipulated that some of her claims were meritless and otherwise did not respond to other arguments (C.R. 94-103). Accordingly, on May 25, 2006, the district

court issued an order granting in part Defendants' Rule 12(b)(6) partial motion to dismiss and dismissed with prejudice Wang's claims against Treta, individually, under the ADEA, Title VII and the TCHRA; against Prudential for Title VII race discrimination and retaliation; against Prudential under the TCHRA, "disparate impact" as a basis for any claim; and the claim for intentional infliction of emotional distress (C.R. 300-304).

4. Wang Amended Complaint and Prudential Filed An Initial Motion For Summary Judgment and Motion To Dismiss

Shortly after the district court issued its order, Wang filed her First Amended Complaint asserting claims against Prudential for age discrimination under the ADEA and Section 21 of the Texas Labor Code, for race discrimination, disparate treatment, and hostile work environment under 42 U.S.C. § 1981, against Prudential and Treta and for negligent supervision, negligent retention, and defamation against both Defendants (C.R. 305). With Wang's consent, her counsel withdrew his representation on August 29, 2006, and Wang proceeded *pro se* (C.R. 392).

On September 15, 2006, Wang filed a Second Amended Complaint and asserted that Prudential wrongfully terminated her and in so doing breached her contract, breached a duty of good faith and fair

dealing, and violated "her rights to be free from hostile work environment, age, sex, and/or race discrimination" (C.R. 446). Wang failed to identify the specific statutory bases for these claims in her Second Amended Complaint (*Id.*). The Second Amended Complaint did, however, incorporate by reference the jurisdictional and venue averments contained in the First Amended complaint, which, in turn, referenced 42 U.S.C. § 1981, the ADEA, and Section 21 of the Texas Labor Code (*Id.*). In her Second Amended Complaint, Wang also alleged that Prudential failed to pay her certain earnings, benefits, and commissions to which she claimed entitlement (*Id.*).

The Second Amended Complaint did not allege an Equal Pay Act ("EPA") claim because it did not allege any legal claim or facts that would support such a claim – that Wang was paid less than male agents for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. Moreover, the Second Amended Complaint did not allege a state law conversion claim because it did not allege the legal claim or facts that were necessary to sustain each element of the claim.

On September 22, 2006, Prudential and Treta filed a partial motion to dismiss under Rule 12(b)(6) seeking to dismiss all potential claims asserted against Treta in his individual capacity in this lawsuit as well as the breach of the duty of good faith and fair dealing claim against Prudential (C.R. 455). On October 11, 2006, Prudential and Treta filed an

initial motion for summary judgment seeking the dismissal of Wang's claims for breach of contract, breach of the duty of good faith and fair dealing, and all of her discrimination-based claims (C.R. 462).

Wang filed a motion for a seven-day continuance to file her response. The district court granted that motion. Wang then timely filed a response to the summary judgment motion but failed to file any competent summary judgment evidence such as an affidavit or authenticated documents (C.R. 580, 723). Prudential objected to the competency of portions of Wang's purported evidence (C.R. 725). Wang never filed an additional motion for continuance regarding her response to Prudential's first motion for summary judgment.

5. Court Granted Motion To Dismiss and Initial Motion For Summary Judgment

In a comprehensive and well-reasoned opinion, the district court granted Prudential's and Treta's motion to dismiss and initial summary judgment motion (C.R. 732). The court dismissed with prejudice Wang's claims against Prudential for breach of contract, breach of the duty of good faith and fair dealing, for hostile work environment and for age, sex, and/or race discrimination under the ADEA, Title VII, and 42 U.S.C. § 1981 (*Id.*). Wang's remaining claims against Defendant Treta were also dismissed with prejudice (*Id.*).

In its order, the court noted that Prudential and Treta did not move to dismiss Wang's compensation-based claims and directed both parties to file a report describing whether Wang would pursue those claims, and if so, whether Prudential and Treta would file a supplemental dispositive motion (C.R. 745).

Prudential filed a report that indicated that it believed that Wang's compensation-based claims were solely claims for remedies based on alleged acts of discrimination or breach of contract, which the court had already dismissed (C.R. 746-748). It requested that the court reconsider and enter a final summary judgment, but in the alternative, it indicated that it would file a supplemental dispositive motion (C.R. 748).

After Wang submitted her report, the court ordered Wang to file an additional statement clarifying the basis for her compensation claims and only to list claims that had not been previously dismissed (C.R. 971). Wang then filed a document that clarified her remaining compensation-based complaints (C.R. 986). Significantly, Wang did not assert that she was attempting to bring an EPA or state law conversion claim (*Id.*).

Subsequently, Prudential deposed Wang, and in that deposition, Wang clarified that she based all of her compensation claims on discrimination (C.R. 1212). Therefore, all that potentially remained was Wang's discrimination-based claims concerning Prudential's alleged failure to pay her certain earnings,

benefits, and commissions to which she allegedly became entitled during her tenure with the company.

6. Prudential Filed A Supplemental Motion For Final Summary Judgment, and District Court Granted It

Prudential filed a supplemental motion for summary judgment seeking the dismissal of Wang's remaining discrimination-based compensation claims (C.R. 1129). On April 20, 2007, the court dismissed with prejudice Wang's claims and entered Final Judgment (C.R. 1384, 1391). Wang did not file a post-trial motion whereby she complained that the district court's order was not final because she had an EPA claim or a state law conversion claim that were not addressed by Prudential's motions for summary judgment. Wang filed her notice of appeal (C.R. 1393).

7. Fifth Circuit Court of Appeals Affirmed District Court's Rulings

Wang's Appellant's Brief was confusing and difficult to understand. However, it is clear that among her myriad of complaints, she did not complain that the district court erred in refusing to give her more time to file a response to Prudential's first motion for summary judgment, and she did not complain that the district court's judgment was not final because she had an EPA or state law conversion claim that had not been addressed by Prudential's motions for summary judgment. Prudential filed a

response and explained the propriety of the district court's orders and judgment and also alleged a reply point that Wang had waived her appeal due to inadequate briefing. The Fifth Circuit affirmed the district court's judgment without explanation in an unpublished opinion.

II. REASONS THE PETITION SHOULD BE DENIED

A. This Case Does Not Present Issues Worthy Of Granting Certiorari

This Court should exercise its jurisdiction to review judgments of courts of appeals sparingly, and only in cases of gravity and general importance, or in order to secure uniformity of decision. *See In re Lau Ow Bew*, 141 U.S. 583, 587 (1891). There are two main reasons to confer jurisdiction on this Court to hear cases by writs of certiorari from courts of appeals: to secure uniformity of decision between those courts and to bring up questions of importance which it is in the public interest to have decided by the court of last resort. *See Magnam Import Co. v. Coty*, 262 U.S. 159, 163 (1923). Where a case does not present a conflict or a question of grave importance, this Court should normally not accept a petition. *See Fields v. United States*, 205 U.S. 292, 296 (1907).

The Court should not grant Wang's Petition for Writ of Certiorari because this case does not involve any conflict between the Fifth Circuit and any of its sister courts of appeals or any conflict with this

Court's precedent. This case also does not involve a legal issue of grave importance. Rather, Wang's first issue is whether the district court abused its discretion in not *sua sponte* giving Wang a second extension to file a summary judgment response when Wang never requested a second extension. Wang's second issue is whether the district court erred in rendering a final judgment where Wang's complaint did not state facts that would support necessary elements of alleged claims that were not included in Prudential's motions for summary judgment. This Court should not grant a petition to resolve factual issues. *See NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502-03 (1951). Moreover, as shown below, there are multiple instances of waiver by Wang that require the affirmance of the lower courts' decisions. This Court should not grant a Petition to review an issue not considered below. *See McCullough v. Kammerer Corp.*, 323 U.S. 327, 328 (1945).

Finally, the lower courts' opinions do not set forth any incorrect precedent on the issues raised by Wang in this Petition. Rather, the Fifth Circuit's opinion in this case is not published and contains no discussion of any issues. It is not precedential. Moreover, because Wang did not raise her issues below, the lower courts' opinions do not address a second extension of time to file Wang's summary judgment response or the disposition of judgment notwithstanding any alleged remaining EPA or state law conversion claim. Accordingly, this Court should not expend its valuable, and limited, resources on this case.

B. The Lower Courts' Opinions Were Correct In Dismissing Wang's Claims

1. District Court Did Not Abuse Its Discretion In Failing To *Sua Sponte* Grant Wang A Second Continuance To File Her Response To Prudential's First Motion for Summary Judgment

The district court did not abuse its discretion in failing to *sua sponte* grant Wang a second continuance regarding her response to Prudential's first motion for summary judgment. The standard of review over a district court's ruling on a motion for continuance is an abuse of discretion. *See Ungar v. Sarafite*, 376 U.S. 575, 589 (1964); *Adams v. Travelers Indemnity Co.*, 465 F.3d 156, 162 (5th Cir. 2006). After Prudential filed its first motion for summary judgment, Wang filed a motion for continuance. The district court granted that motion and gave Wang all the time requested. Wang then filed a response and did not seek any further extension of time. The district court did not abuse its discretion in failing to *sua sponte* give Wang relief that she never requested. *See White Consol. Indus. v. Westinghouse Elec. Corp.*, 179 F.3d 403, 411-12 (6th Cir. 1999) (nonmovant waives appellate complaint about need for more time to respond to summary judgment motion by failing to raise issue with district court).

Even if Wang had filed a second motion for continuance, the district court would not have abused its discretion in denying it. In seeking a continuance,

a party must show diligence in securing discovery. *See Kozikowski v. Toll Bros.*, 354 F.3d 16, 26 (1st Cir. 2003); *Plott v. General Motors Corp.*, 71 F.3d 1190, 1196-97 (6th Cir. 1995). Having not sought a second continuance, Wang did not make any showing of diligence.

Further, the record indicates a complete lack of diligence on Wang's part. Wang filed this suit on October 24, 2005 (C.R. 20). On February 17, 2006, the district court entered a scheduling order pursuant to Federal Rule of Civil Procedure 16 (C.R. 190). Wang did very little to prosecute this case (C.R. 418-419). On August 25, 2006, Wang and her counsel filed a motion to allow her counsel to withdraw (C.R. 392). In that motion, she specifically stated that allowing the withdrawal would "not disrupt the suit" (C.R. 393). Wang signed the motion to withdraw and adopted this representation (C.R. 394). Based on this motion, the district court allowed the withdrawal on August 29, 2006 (C.R. 400-401). Wang complains throughout her Petition about not having an attorney, yet she represented to the district court that such would not delay or disrupt the suit.

Wang only served limited discovery, which was subsequently stricken by the district court, and did not notice any depositions (C.R. 419). Wang did little more in the approximate one year the suit was on file than simply file her complaint and amend it. There was no showing of any diligence. Wang did not allege or provide evidence concerning how long she had requested the EEOC's file. Wang also failed to allege

or prove any harm or detriment to her case if the district court did not *sua sponte* grant her a second extension.

Finally, a party seeking a continuance to allow more time to file a response to a summary judgment motion must support the request for a continuance with an affidavit. *See Hackworth v. Progressive Cas. Ins. Co.*, 468 F.3d 722, 732 (10th Cir. 2006). Wang did not support her motion for continuance with an affidavit, and her response to Prudential's summary judgment motion did not have any proof regarding her attempts to secure the EEOC's file. Accordingly, the district court did not abuse its discretion in not granting Wang an extension that was never sought by Wang regarding her response to Prudential's first motion for summary judgment. The court of appeals did not err in affirming the district court's judgment.

2. District Court Did Not Err In Granting Final Judgment

The district court did not err in entering a final judgment because Prudential's motions for summary judgment addressed all of Wang's pleaded claims. In this Court for the first time, Wang complains that the district court's judgment was not final because she still had EPA and state law conversion claims outstanding. That is not true because she never pled those claims.

Under Federal Rule of Civil Procedure 8(a), the plaintiff must give the defendant fair notice of the

nature of her claims and the ground for them. *See Erikson v. Pardus*, 127 S.Ct. 2197, 2200 (2007). To give fair notice, a complaint must give a short and plain statement of the claim, which must include some factual allegations concerning all material elements of a viable theory of recovery. *See Brownlee v. Conine*, 957 F.2d 353, 354 (7th Cir. 1992). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929, 940, 2007 U.S. LEXIS 5901, *21 (2007). As this Court recently stated:

> While, for most types of cases, the Federal Rules eliminated the cumbersome requirement that a claimant "set out in detail the facts upon which he bases his claim," *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957) (emphasis added), Rule 8(a)(2) still requires a "showing," rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only "fair notice" of the nature of the claim, but also "grounds" on which the claim rests. *See* 5 WRIGHT & MILLER § 1202, at 94, 95 (Rule 8(a) "contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented" and does not authorize a pleader's "bare averment that he wants relief and is entitled to it").

Id. Wang failed to meet this requirement concerning an EPA claim or a state law conversion claim. As noted by the district court, Wang's filings have consistently been "confusing, diffuse, disordered, and, in many ways, incoherent" (C.R. 742).

Wang's Second Amended Complaint stated no factual basis for her discrimination claims and alleged no facts that would support an EPA claim: that she was compensated less than an equivalent male employee for performing equal work (C.R. 446-447). *See* 29 U.S.C. § 206(d). Moreover, her Second Amended Complaint incorporated the jurisdictional statement of her previous complaint (C.R. 466). The previous complaint expressly listed Title VII, ADEA, and § 1981 but omitted any reference to the EPA (*Id.*). Under any standard of reviewing her Second Amended Complaint, Wang did not raise an EPA claim. In her response to Prudential's supplemental motion for summary judgment regarding the compensation-based claims, she did not cite to the EPA and made no arguments thereunder (C.R. at 1277-1299). Simply stated, Wang did not plead an EPA claim, and the district court did not err in granting a final judgment. Moreover, an EPA claim makes no sense in the context of the facts of this case: Wang was compensated by the same commission rate as all other similarly situated employees.

Wang also did not plead a state law conversion claim. In Texas, the tort of conversion is defined as the unauthorized and wrongful assumption and exercise of dominion and control over the property of

another, to the exclusion of and inconsistent with the owner's rights. *See Waisath v. Lack's Stores, Inc.*, 474 S.W.2d 444, 446 (Tex. 1971). In Texas, to allege a claim for conversion of personal property, a party must establish the following: (a) the plaintiff owned or had possession of the property or entitlement to possession; (b) the defendant unlawfully and without authorization assumed and exercised control over the property to the exclusion of, or inconsistent with, the plaintiff's rights as an owner; (c) the plaintiff demanded return of the property; and (d) the defendant refused to return the property. *See Apple Imports, Inc. v. Koole,* 945 S.W.2d 895, 899 (Tex. App. – Austin 1997, writ denied). Moreover, a party has no claim for conversion based on the loss of unspecified money. *See Hodges v. N. Trust Bank of Tex. N.A.,* 54 S.W.3d 518, 522 (Tex. App. – Eastland 2001, pet. denied).

Wang's Second Amended Complaint does not allege any facts that would support the position that Prudential exercised control over any non-monetary based personal property or that she demanded its return and Prudential refused. Therefore, under any standard for reviewing pleadings, Wang did not allege a state law conversion claim. The district court correctly entered a final judgment in this case because its opinions resolved all outstanding claims between Wang and Prudential.

C. Wang Waived Her Complaints By Failing To Properly Raise Them With The Lower Courts

1. Wang Waived Any Complaint Regarding The Finality Of The District Court's Judgment By Failing To Raise That Complaint With The District Court

Wang waived any alleged EPA or state law conversion claims at the district court level by failing to complain to that court that the judgment was not final because of her alleged outstanding claims. Judicial efficiency is an important public policy. It is served by requiring parties to preserve their appellate complaints by raising them in the district courts, where if meritful they may be corrected. Efficiency and the justice system are not served by allowing parties to "lay behind the log" and raise issues for the first time on appeal.

Accordingly, a party waives an issue that is not first properly raised to the district court. *See Kohler v. Englade*, 470 F.3d 1104, 1114 (5th Cir. 2006); *In re Quenzer*, 19 F.3d 163, 165 (5th Cir. 1993). Moreover, a party has a duty to inform a district court when it does not resolve an issue in a final judgment. *See Evergreen Invs., L.L.C. v. FCL Graphics, Inc.*, 334 F.3d 750, 757 (8th Cir. 2003); *Hopkins v. Saunders*, 199 F.3d 968, 974-975 (8th Cir. 1999). *See also Moulton v. Vigo County*, 150 F.3d 801, 803 (7th Cir. 1998).

Wang never filed a motion or otherwise complained to the district court that its judgment was improper because it was not final. Wang never informed the district court that she allegedly had outstanding EPA or state law conversion claims that were not disposed of by Prudential's summary judgment motions. If she had raised this complaint, and it was meritful, with which Prudential disagrees, the district court could have easily corrected this error. However, she did not raise this issue in any respect, and she has therefore waived any complaint about the finality of the district court's judgment.

2. Wang Waived Complaints Raised In Her Petition For Writ Of Certiorari By Failing To Raise Them With The Court Of Appeals

Wang has also waived her complaint about the timing of her response to the first motion for summary judgment and the finality of the district court's judgment by failing to properly raise them with the court of appeals. Although courts liberally construe briefs of *pro se* litigants, *pro se* parties must still brief the issues and reasonably comply with the requirements of Rule 28 of Federal Rules of Appellate Procedure. *See Grant v. Cuellar*, 59 F.3d 523, 524 (5th Cir. 1995). An appellant's brief must contain an argument, which in turn must contain her "contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." FED. R. APP. P. 28(a)(9). *See Yohey v. Collins*, 985 F.2d

222, 225 (5th Cir. 1993). *See also United States v. Wilkes*, 20 F.3d 651, 653 (5th Cir. 1994) ("While we construe pro se pleadings liberally, pro se litigants, like all other parties, must abide by the Federal Rules of Appellate Procedure.").

In her appellant's brief in the court of appeals, Wang failed to raise any issue regarding the timing of her response to Prudential's first motion for summary judgment. Further, in her brief, Wang made only vague references to the EPA and never mentioned a conversion claim in any respect. She certainly did not complain about the finality of the district court's judgment. The court of appeals did not have the opportunity to rule on Wang's complaints because Wang failed to brief them. Judicial efficiency is not served by having this Court decide issues never raised in either the district court or the court of appeals. Therefore, Wang waived the issues asserted in her Petition for Writ of Certiorari because she failed to raise them with the court of appeals.

CONCLUSION

Prudential requests that this honorable Court deny Wang's Petition for a Writ of Certiorari.

Respectfully submitted,

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